Affirmed. Dec 12.

Judge Davis.

Not in military service.

Judge Heard

H. R. 18—84

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 368.

ADOLPH GUTTMAN AND ANDREW STUART, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 22, 1872.

Oct. 7, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 368.

ADOLPH GUTTMAN AND ANDREW STUART, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed June* 17, 1870.

U. S. Court of Claims.

ADOLPH GUTTMAN, ANDREW STUART
vs.
THE UNITED STATES. } No. 6183.

To the honorable Court of Claims:

The petition of Adolph Guttman and Andrew Stuart, respectfully represents:

That the said Andrew Stuart, on the 25th day of July, 1864, entered into a contract with the Government of the United States, the defendant in this suit, for the transportation of military stores and supplies. A copy of said contract is hereto annexed marked "Exhibit A.," and plaintiffs pray may be taken and read as a part of this petition.

That said Stuart provided himself with the necessary means of transportation for fulfilling said contract in all respects, and fully complied with all the stipulations contained in said contract on his part to be performed.

That, in the month of July, 1864, while he was proceeding, in execution of said contract, with a train of wagons from Fort Leavenworth, Kansas, to Fort Union, New Mexico Territory, the said train was, on the 12th day of July, 1864, in the vicinity of Cow Creek, Kansas, attacked by a band of hostile Indians, and without any fault or neglect on the part of the claimants, or any of them or of their agents, 56 head of oxen, employed in moving said train, were captured by the said band of hostile Indians, and no part thereof has been recovered.

That all of the said oxen and the other means of transportation used in said train, had, in accordance with Article VI of said contract, been duly submitted to the inspection of an officer of the Quartermaster's Department, at the place of departure, and by him accepted.

2 And petitioners say that, by the terms of said contract and the requirements thereof, which were complied with by said Stuart, the said oxen were in the military service of the United States.

Your petitioners further show that the said oxen were, at the time of their capture, employed by the said Stuart in fulfilling his said contract, but they were at that time the property of the said Guttman. That the value of the said 56 head of cattle or oxen, at the time they were taken into the service of the United States, was $4,480.00.

Your petitioners further show that, by the terms of the second section of the act of Congress, approved March 3d, 1849, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," the United States is liable to pay the reasonable value of said oxen at the time they were taken into its military service as aforesaid.

That said claim has not been formally presented to the 3d Auditor of the Treasury for settlement, for the reason that that officer has refused to settle any claim of this class, upon the ground that property employed in the transportation of military supplies upon the plains, under transportation contracts, is not in the military service of the United States, within the meaning of said act.

Your petitioners further show, that they and each of them have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encourage-

ment to rebellion against the said Government; and they pray the judgment of this honorable court for the said sum of $4,480.00, according to the interests hereinbefore set forth, and for such other and further relief as the nature of the case may show they or either of them are entitled to.

HARVEY SPALDING,
Attorney for Claimants.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Harvey Spalding, attorney for claimants, being duly sworn, deposeth that he is attorney for the claimants in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made except as in said petition is stated; that
3 claimants are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HARVEY SPALDING,
Attorney for Claimants.

Sworn and subscribed to before me, a notary public in and for said district and county.

Witness my hand and seal, this 17th day of June, A. D. 1870.

[SEAL.] EDM. F. BROWN,
Notary Public.

Claimant's solicitors—
C. F. PECK and HARVEY SPALDING,
Washington, D. C.

EXHIBIT A.

This agreement, made and entered into this 25th day of July, one thousand eight hundred and sixty-four, by and between Captain Henry C. Hodges, assistant quartermaster United States Army, on the authority and by direction of the Secretary of War, for and on behalf of the United States, of the first part, and Andrew Stuart, of Steubenville, in the State of Ohio, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree to and with each other as follows, viz:

ARTICLE I. That the said Andrew Stuart shall receive, at any time, in any of the months from April to September, inclusive, during the year one thousand eight hundred and sixty-four, from the officers of the Quartermaster's Department at Forts Leavenworth and Riley, in the State of Kansas, and the town of Kansas, in the State of Missouri, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition, by the officer
4 or agent of the Quartermaster's Department, at any or all of the above-named points or places, and transport the same with all practicable dispatch, and deliver them in like good order and condition, to the officer or agent of the Quartermaster's Department on duty, or designated to receive them, at Fort Union, in the Territory of New Mexico, or any other depot that may be designated in that Territory; at any posts or stations that are or may be established in the State of Kansas, or in the Territory of Colorado, south of latitude 40° north;

at Fort Garland, or any other point or post on the route, agreeably to the instructions he may receive from an officer or other authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies at Fort Leavenworth, or other place of departure; and for the faithful performance of such service, he shall be paid in the manner hereinafter provided for in article 14 of this agreement, and at the rates specified and shown in the tabular statement hereto annexed, and signed by the parties to this agreement, which statement is considered as part hereof.

ARTICLE II. That the said Andrew Stuart agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts or depots named in Article I, or from or to any other post or depot that may be established within the district named in said article, any number of pounds of military stores and supplies, from and between one hundred thousand pounds and ten millions of pounds in the aggregate.

ARTICLE III. For the stores to be forwarded from Forts Leavenworth and Riley, or from any other points of departure on the Missouri River, notice shall be given to said Andrew Stuart at his place of business or agency in the vicinity of Fort Leavenworth, Kansas.

ARTICLE IV. In order that the said Andrew Stuart shall be in readiness to meet the demands and requirements made upon him for transportation under this contract and agreement, due notice shall be given him or his agent of the quantity and kind of stores to be transported at any one time; at what points the stores will be ready for delivery to him, and the place of their destination, subject to such changes as may be decided upon while in transitu, as herein provided for, that is to say: for any quantity less than three hundred thousand pounds, twenty days' notice; for any quantity between three hundred thousand and six hundred thousand pounds, twenty-five days' notice; for any quantity between six hundred thousand and one million of pounds, forty days' notice; for any quantity between one million of pounds and two million five hundred thousand pounds, fifty days' notice; for any quantity between two millions five hundred thousand pounds and five millions of pounds, sixty days' notice.

ARTICLE V. The military stores and supplies which shall be transported under Article I of this agreement, destined to Fort Union, or other depot that may be designated in the Territory of New Mexico, or to points beyond, shall be consigned to Fort Union or such other depot, and receipts shall be given by the officer of the Quartermaster's Department serving at the place of consignment for the full amount of stores that shall be delivered; and upon such receipt payment shall be made to the said Andrew Stuart, as herein provided.

ARTICLE VI. That all the means of transportation to be used by the said Andrew Stuart, under the agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department at the place of departure, and such only shall be used as may be then and there accepted by him, provided that the said Andrew Stuart shall be authorized to employ mules or cattle, as he may elect.

ARTICLE VII. That, to ensure the delivery of the stores and to aid the contractor in the execution of his agreement, certificates setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of the journey, shall be given by the officers or agents of the Quartermaster's Department at the following points, to wit, at Fort Riley and Fort Larned. Upon each certificate so given, setting forth the good condition of the train, payment shall be

made to the contractor for the service rendered to that point; and upon the arrival of the train at the place of destination or delivery, the officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading, in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which endorsement payment shall be made as per contract, deducting the amount of any payment or payments previously made, and also the value of any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor.

ARTICLE VIII. In all cases where stores have been transported
6 by the said Andrew Stuart, under this agreement, a board of survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of proper care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight due to shrinkage, and for leakage of vinegar or molasses or other liquids, the contractor shall not be held liable, if the packages are delivered in good order and condition; and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficienc'es or damages the contractor shall pay the cost at the point he receives the articles, and the freight shall be deducted in the latter case in proportion to the amount of damage assessed. Should no board of survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores as specified in the bill of lading in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after payments that may become due. Transportation to be paid in all cases, according to the actual distance travelled from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies.

ARTICLE IX. That in case any one or more of the trains of the said Andrew Stuart are stopped or delayed at any time or place exceeding two days, either under the orders of an officer of the Quartermaster's Department or the commanding officer of a post, or of troops present, or any other act of the Government or its agents, the contractor shall be paid, upon a statement, in writing, procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train for each and every day they may be so delayed; and in case the officer or agent of the Government
aforesaid shall refuse to furnish such statement in writing, then
7 the delay shall be paid for, as above, on affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Government to halt trains shall be given to the contractor or his agents in writing, expressing fully the reasons therefor.

ARTICLE X. That the said Andrew Stuart shall be furnished with a suitable escort for the protection of the supplies, should he be required

to transport in any one train a less quantity than one hundred and twenty-five thousand pounds, but whenever required to transport one hundred and twenty-five thousand pounds, or more, then no escort shall be furnished.

ARTICLE XI. That the said Andrew Stuart shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract on the route specified by this agreement, during the year one thousand eight hundred and sixty-four, provided the weight of such military stores and supplies shall not exceed in the aggregate ten millions of pounds; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so.

ARTICLE XII. That in case of failure, by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said Andrew Stuart to be in readiness to meet the demands and requirements made upon him for transportation, under this contract or agreement, after due notice shall have been given him or his agents, as provided for in Article IV of this agreement, then the officer or authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies, shall have power to supply the deficiency, either by purchase, hire, or special contract, as the said officer or agent may elect, and the said Andrew Stuart will be charged with difference of cost or expense thus incurred.

ARTICLE XIII. It is further understood that, if at any time, stores or supplies are required to be transported back to any point on the road or to any of the original points of departure included in this agreement, they shall be carried back at the same rate per hundred pounds per hundred miles, as provided for by said agreement for the month in which said stores were loaded.

ARTICLE XIV. For and in consideration of the faithful per-
8 formance of the stipulations of the agreement, the said Andrew Stuart shall be paid, at the office of the Quartermaster's Department at Fort Leavenworth, Kansas, according to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement, in the legal currency of the United States.

ARTICLE XV. It is expressly agreed and stipulated between the parties to this contract, that, upon mutual agreement it may be changed, altered, modified, or abrogated, in whole or in part.

ARTICLE XVI. It is expressly understood that no member of Congress shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

In witness whereof the undersigned have hereunto placed their hands and seals, at Fort Leavenworth, Kansas, the day and date above written.

(Signed) HENRY C. HODGES, [SEAL.]
A. Q. M. U. S. A.
ANDREW STUART, [SEAL.]

Witnesses:

TABULAR STATEMENT.

Schedule of prices per one hundred (100) *pounds per one hundred* (100) *miles, to be paid Andrew Stuart, contractor, for the transportation of military stores and supplies, under an agreement between Henry C. Hodges, Quartermaster U. S. Army, and Andrew Stuart, dated Fort Leavenworth, Kansas, the 25th of July,* 1864.

Route.	Points of starting.	Periods of starting.					
		April.	May.	June.	July.	Aug.	Sept.
No. 2	From and to points and places named in art. 1 of above agreement.....	$1.97	$1.97	$1.97	$1.97	$1.97	$1.97

9 In the Court of Claims of the United States.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } No. 6183.

And the said defendants by their Attorney-General now come and demur to the petition in this cause for the reason that the said petition does not allege facts sufficient to constitute a cause of action against said defendants, and therefore said defendants pray judgment.

THO'S H. TALBOT,
Ass't Att'y-General.

Filed August 2d, 1870.

10 In the Court of Claims.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } 6183.

Ordered that the demurrer be sustained with leave to the claimants to amend their petition within thirty days, and on failure to do so judgment of the dismissal of the petition will be entered up in the case.

By the court.

JAN'Y 30, 1871.

11 In the Court of Claims.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } 6183.

Now comes the said claimants and pray that an appeal may be allowed them from the judgment of the court in this cause to the Supreme Court of the United States.

C. F. PECK,
Solicitor for Cl'm'ts.

Filed in the clerk's office, April 10, 1871, and application allowed by the court of same date.

12 In the Court of Claims.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } No. 6183.

The claimants, not having amended their petition, under the order of the court of Jan'y 30, 1871, judgment is ordered to be entered in this case as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree, that the claimants take nothing by their petition, and that the same be dismissed.

By the court.

APRIL 13, 1871.

13 United States Court of Claims. Dec. term, 1870.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } 6183.

Now comes the said claimants and move that the order heretofore entered granting an appeal in this cause be vacated for the reason that the said order was entered before any final judgment had been entered in said cause.

Final judgment having since been entered, the claimants now pray an appeal from such final judgment in this cause to the Supreme Court of the United States.

C. F. PECK,
Solicitor for Claimants.

Filed in the clerk's office, April 13, 1871.

ADOLPH GUTTMAN AND ANDREW STUART
vs.
THE UNITED STATES. } 6183.

Ordered that the appeal of the 10th April, 1871, be vacated.

Ordered that the appeal be allowed as prayed for.

By the court.

APRIL 13, 1871.

14 In the Court of Claims.

ADOLPH GUTTMAN, ANDREW STUART,
vs.
THE UNITED STATES. } No. 6183.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the solicitor for claimants, for the allowance of an appeal, as filed in the clerk's office, 13th April, 1871, and of the order of the court, allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this twenty-second day of March, A. D. 1872.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 368. Adolph Guttman and Andrew Stuart, appellants, vs. The United States. Court of Claims. Filed 22d March, 1872.